NO. 90-1137

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

AL C. PARKE, WARDEN, PETITIONER,

- versus -

NATHAN VERNON GILLENWATER, RESPONDENT.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN HOLDING THAT A ONE SENTENCE ORDER OF KENTUCKY'S HIGHEST COURT DENYING DISCRETIONARY REVIEW WAS NOT CLEARLY AND EXPRESSLY BASED UPON PROCEDURAL DEFAULT, PRECLUDING A CAUSE AND PREJUDICE ANALYSIS.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED.	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.	iii
OPINION BELOW	iv
JURISDICTION.	iv
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	iv
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	2
REASONS FOR DENYING THE PETITION FOR WRIT.	3
CONCLUSION.	8

TABLE OF AUTHORITIES

PAGE

Cases

Goodwin v. Collins, 910 F.2d 185 (5th Cir. 1990). . . . 3, 4, 6

Harris v. Reed, 489 U.S. 255, 190 S.Ct. 1035, 103 L.Ed.2d 308 (1988). . . . . 4, 5, 6, & 7

McQuown v. McCartney, 795 F.2d 807 (9th Cir. 1986). . . 5, 6, 7

Ylst v. Nunnemaker, 904 F.2d 473 (9th Cir.) cert. granted, ____ U.S. _____, 111 S.Ct. 384 (1990). . 7

Rules

Rule 76.20(9)(a) Kentucky Rules of Civil Procedure. 7

OPINIONS BELOW

The Respondent adopts the opinions below as set out in the Petition.

JURISDICTION

The Respondent adopts the jurisdictional statement as set out in the Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Respondent adopts the constitutional provisions and statutes recited in the Petition, and adds to it as follows:

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, excepting cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person shall be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The Respondent adopts the statement of the case as set out in the Petition, adding to it one relevant fact omitted.

In January, 1981, the Respondent filed a state court Motion to Vacate pursuant to Rule 11.42, Ky. R. Crim. P. [Joint Appendix A-78 - A-96]. The Carter Circuit Court denied the Motion by Order dated March 7, 1981. [Jt. App. at A-76]. The Respondent filed no appeal from that denial and has maintained throughout his second post-trial Motion to Vacate in state court and in the Petition for Writ of Habeas Corpus that he never received the Order denying the Motion. The Respondent continued to believe the Motion had not been disposed of at the time of the filing of his second state court Motion to Vacate.

SUMMARY OF THE ARGUMENT

The Respondent urges that there is no special and important reason for review by this Court of the decision below. The three points raised in support of the Petition are not availing.

First, the opinion of the United States Court of Appeals for the Sixth Circuit is not in conflict with opinions of other circuits. The Petitioner's cited cases are factually and legally distinguishable.

Second, the thrust of this Court's ruling in Harris v. Reed, 489 U.S. 255 109 S.Ct. 1035, 103 L.Ed.2d 308 (1988), is not to focus on the meaning of "judgment," but whether the state court Order bringing the case to the federal judiciary disposed of the matter on grounds of procedural default or upon the merits.

Finally, the Petitioner's citation to Kentucky Rules of Court regarding the definition of discretionary review in that forum is not applicable to the limitation of federal habeas review.

REASONS FOR DENYING THE PETITION FOR WRIT

The Petitioner has asserted that "several" important and special reasons exist for this Court to review the Order of the United States Court of Appeals for the Sixth Circuit. The Petition, however, raises only three arguments, which will be addressed herein seriatim.

I. RESPONSE TO PETITIONER'S FIRST ARGUMENT

The thrust of Petitioner's first and major argument is that the Kentucky Supreme Court's denial of discretionary review without comment, which was found insufficient to raise a procedural bar by the Sixth Circuit Court of Appeals in the instant case,[1] is in conflict with the Fifth Circuit's holding in Goodwin v. Collins, 910 F.2d 185 (5th Cir. 1990). Such conflict does not exist.

The appeal in Goodwin was from a state appellate court which, in a prior proceeding, but not by the last order entered, had found a procedural default. The appeal in the instant case was from the Kentucky Supreme Court which disposed of a petition for discretionary review without comment in a pro forma order. The holding in Goodwin states "[b]ecause of the last state court's reliance on procedural default, we are procedurally barred from reviewing the merits of the claim." 910 F.2d at 187. In the instant case, the Sixth Circuit held, "the Kentucky Supreme Court, in denying discretionary review of Petitioner's second Rule 11.42 motion, did not clearly and expressly base its ruling upon

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[1]The Sixth Circuit opinion, unpublished, is found at page 25a of the Petition.

Gillenwater's procedural default." Petition Appendix, p. 4a.

"[I]n Goodwin," argues the Petitioner, "the intermediate state appellate court rendered a written opinion and the state supreme court simply denied discretionary review without written opinion." [Petition, p. 8]. Based on this statement, the Petitioner concludes that "[t]he facts in the two cases are the same," Id. These statements are not verified in the federal Goodwin opinion.

A review of the opinion in Goodwin fails to reflect that any of its claims, substantive or procedural, were ever presented to the Supreme Court of Texas. The only Texas appellate court reported to have reviewed Goodwin was the Texas Court of Criminal Appeals which, after providing an appeal on the merits, twice thereafter denied discretionary review, without a written opinion in the first instance and without written order in the last state appeal. The federal appeal was from the Texas Court of Criminal Appeals, not the Texas Supreme Court. 910 F.2d at 186.

It is understood to be the Petitioner's argument that (1) the Kentucky Supreme Court was not a "last court rendering judgment" and, (2) a summary denial of discretionary relief by that court was not a decision on the merits (understood as exhaustion of state remedies for federal habeas review purposes.) In terms of Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1035, 103 L.Ed.2d 308 (1988), the "last state court rendering judgment," 489 U.S. at 262, analysis would encompass both the order of the Texas Court of Criminal Appeals in the Goodwin case and the order of the Kentucky Supreme

Court in the instant case:

> "[A] state court that wishes to rely on a procedural bar in a one-line pro forma order easily can write 'relief is denied for reasons of procedural default.' Of course, if the state court under state law chooses not to rely on a procedural bar in such circumstances, then there is no basis for a federal habeas court's refusing to consider the merits of the federal claim." (Citation omitted.)

489 U.S. at 265 n.12.

The Petitioner's reference to the Ninth's Circuit pre-Harris opinion in McQuown v. McCartney, 795 F.2d 807 (9th Cir. 1986), involves a different judicial policy than that announced in Harris. The McQuown decision reflects the former use of presumptive disposition in the Ninth Circuit under which summary denial by the California Supreme Court of an original habeas petition would be deemed a decision on the merits; and, until a state petitioner seeks relief in the state supreme court, he has not exhausted state remedies. 795 F.2d 809. The emphasis was changed by Harris to give the state courts the opportunity and responsibility for specifically declaring when the disposition of a case was made for procedural defaults.

II. RESPONSE TO PETITIONER'S SECOND ARGUMENT

Petitioner's second argument differs little from the first argument except in specificity and is understood to ask (1) "what constitutes a state court rendering judgment" and, (2) "whether a silent order is in fact a judgment." Petition, pp. 9-10. The instructional value of Harris appears to turn on other matters. Viewed from the perspective of a federal court receiving an appeal from the state judicial system, the initial inquiry is whether the

state court's order identifies the case as having been disposed of on grounds of procedural default or upon the merits. The former is the particular concern of the Harris decision, and the dispositive state court order bringing the case to the federal judiciary, whether characterized as a judgment or not, is the object of federal scrutiny.

Petitioner cites the Ninth Circuit opinion in Ylst v. Nunnemaker, 904 F.2d 473 (9th Cir.), cert. granted, ____ U.S. ____, 111 S.Ct. 384 (1990), a post-Harris case, in addition to McQuown and Goodwin, as evidence of uncertainty and conflict among the circuits that a silent state supreme court order is not a decision on the merits. Petition, p. 9. In Nunnemaker, the court found that a disposition without comment of an original habeas petition in the state's highest court could be federally reviewed under Harris. [But not because of any presumption used by the Ninth Circuit to convert such orders into decisions on the merits. See McQuown, 795 F.2d at 809]. The McQuown court found only that a failure to exhaust state remedies occurred where the petitioner had not sought relief in the state supreme court. 795 F.2d at 810. Finally, the Fifth Circuit holding in Goodwin affirmed denial of federal review because of a state procedural default disposition in the appellate court from which the appeal was taken. 910 F.2d at 187.

There is no facial conflict among these opinions from different circuit courts of appeal although each presents differences reflecting local law. The Sixth Circuit permitted

federal review in the instant case from a silent disposition by the Kentucky Supreme Court. Consistent with McQuown and Nunnemaker, the Sixth Circuit did not construe the silence as a decision on the merits or as a decision based upon grounds of procedural default but rather, under Harris, determined that the failure of the state court to elect to specify procedural grounds as the basis for decision was sufficient for federal review.

Petitioner's argument ultimately must be read as saying that the Harris court's reference to the "last state court rendering a judgment," 489 U.S. at 262, is inconsistent with the Harris court's approval of state pro forma orders which succinctly specify denial based on procedural default. 489 U.S. at 265 n.12. Otherwise, its reliance on definitions of "judgment" and "silent order" makes no sense in terms of what the federal judiciary is to do upon receipt of an appeal from the state judiciary; and, we submit, the judicial administrative problems raised by ambiguity in state court orders are of primary significance in Harris, 489 U.S. 264, 265.

III. RESPONSE TO PETITIONER'S FINAL ARGUMENT

Petitioner's final argument asserts that denial of discretionary review by the Kentucky Supreme Court under Ky. R. Civ. P. 76.20(9)(a), "is no different than a denial of a petition for writ of certiorari in this Court." Petition, p. 12. This view is partially correct and applies except where state supreme court actions are subject to review in federal courts. Noteworthy among such exceptions are those state post-conviction criminal cases containing federal claims, which because of

traditional exhaustion of state remedy requirements, must be addressed to the state's highest court. 489 U.S. 262, 263.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, H. DAVID HERMANSDORFER, a member of the Bar of this Court, hereby certify that on this the 13th day of February, 1991, a true and correct copy of the Respondent's Motion for Leave to Proceed In Forma Pauperis and the Response to Petition for Writ of Certiorari in the above-styled case was mailed, first-class mail, postage prepaid, to Frederic J. Cowan, Attorney General, Capitol Building, Frankfort, Kentucky 40601 and Carol C. Ullerich, Assistant Attorney General, Capitol Building, Frankfort, Kentucky 40601. I further certify that all parties required to be served have been served.

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